

ORIGINAL

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2008 FEB 25 PM 2:16

JEANNE WICKS, CLERK ✓
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BY: _____

THE STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.)
)
STEVEN CARROLL DEMOCKER,)
)
Defendant.)
_____)

P1300
No. CR 2008-1339

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
FRIDAY, JANUARY 29, 2010
1:30 P.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HEARING ON MOTIONS

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

JANUARY 29, 2010
1:30 P.M.

HEARING ON MOTIONS

APPEARANCES:

FOR THE STATE: MR. JOE BUTNER AND MR. JACK FIELDS.

FOR THE DEFENDANT: MR. LARRY HAMMOND AND MS. ANNE
CHAPMAN APPEARING TELEPHONICALLY.

FOR VICTIMS KATHERINE AND CHARLOTTE DEMOCKER:
MR. CHRISTOPHER DUPONT APPEARING TELEPHONICALLY.

THE COURT: For the record, this is
CR 2008-1339, State versus Steven Carroll DeMocker.
Mr. DeMocker is present in custody, with Mr. Hammond being
physically here in the courtroom. Miss Chapman is on the
line. Mr. Dupont, on the line. Mr. Butner is here for the
County Attorney's Office, representing the State. And
Mr. Fields is here, also from the County Attorney's Office.

I set the matter for a pretrial
conference last week -- it seems like so long ago -- and part
of it was to see what had been accomplished on the discovery,
what had been accomplished in terms of the physical layout,
the ability of Mr. DeMocker -- you know, what the sheriff's
office had done in connection with his access to his
materials to try to prepare for trial.

And so Mr. Dupont, in the meantime, has
filed a request with the Court concerning Katie and Charlotte
DeMocker's exercise of victim's rights and communications
with the County Attorney's Office, apparently.

1 So I suppose I can take that up if you
2 are prepared to address it.

3 MR. BUTNER: Judge, I am. Mr. Dupont and I
4 have spoken about that particular motion, the motion I think
5 that's entitled "Motion to Compel Prosecution to Honor
6 Victim's Rights." Mr. Dupont and I are attempting to
7 ameliorate the difficulties that we have had in getting
8 together and communicating with the victims and so forth, and
9 I think that we have agreed to hold this motion in abeyance
10 in the hope that we can get this resolved. He can, of
11 course, certainly speak for himself, if he has something
12 different to say about what I've just said.

13 THE COURT: Mr. Dupont, were you able to hear
14 that?

15 MR. DUPONT: I was, Your Honor. Mr. Butner
16 and I spoke yesterday, and we are attempting to find a date
17 agreeable to accomplish what we need to do.

18 THE COURT: Can I just hold that motion for
19 the time being and have either side raise it, if there are
20 ongoing problems with the issue?

21 MR. DUPONT: Yes, that would be fine, Your
22 Honor.

23 THE COURT: So that motion is held in abeyance
24 for the time being, until one or other party lets me know
25 that there needs to be some additional discussion of it.

1 I also gave the lawyers for both sides
2 copies, and I e-mailed copies of the Court's draft on the
3 proposed jury questionnaire. I don't know if you needed to
4 address or wanted to address, in particular, any grammatical
5 spelling or other errors that you see there or other matters.

6 MR. BUTNER: Before we move on to that, Judge,
7 there was one other matter that Mr. Dupont and I had before
8 the Court. Do you recall getting that motion, asking for a
9 return of victim's property?

10 THE COURT: I do recall having received that
11 motion.

12 MR. BUTNER: And I filed a response. I hope
13 you got that, too.

14 THE COURT: That, I am not sure of. Bear with
15 me for a second.

16 MR. BUTNER: I have a relatively brief
17 response, if you don't have one in the court file.

18 THE COURT: All right. I don't see it.

19 MR. BUTNER: That's an unsigned copy.

20 THE COURT: I understand. This is a copy of
21 something that is already filed.

22 MR. BUTNER: It is.

23 THE COURT: Mr. Dupont, have you received a
24 copy of the State's response?

25 MR. DUPONT: I have.

1 THE COURT: Were you intending to file a
2 reply?

3 MR. DUPONT: Your Honor, I can reply orally.

4 THE COURT: Okay. I will take that up, if you
5 want, at this point, then.

6 MR. DUPONT: Would you like me to address the
7 motion now, Judge?

8 THE COURT: Yes, sir.

9 MR. DUPONT: The crux of our motion is that
10 Katie's property was taken without probable cause at the time
11 it was seized and that there continues to be no probable
12 cause to retain her personal property. And so when I filed
13 the motion, frankly, I was expecting a response from the
14 County Attorney detailing why they did have probable cause to
15 seize it in the first place and why they continue to have
16 probable cause. So I would suggest that there are a couple
17 of things we can do at this point.

18 The statute sets forth a procedure that
19 would allow Katie the due process to challenge the seizure
20 and the continued holding of her property by setting an
21 evidentiary hearing whereby the State could do that.

22 The other option, briefly, Your Honor, is
23 just to rule on the pleadings themselves, in which case we
24 request that you issue an order that the property be
25 returned. I noticed in the State's response that they are

1 going to return a couple of pieces of evidence, and we will
2 gladly make arrangements with them to get those back as soon
3 as possible.

4 But with respect to the other property,
5 the prosecution tells you that it is being analyzed now by
6 the lab, which, again, does not go to the probable cause to
7 have the property in the first place. And I guess my
8 understanding is that it may have some evidentiary value,
9 which I guess I had just assumed that the State had complied
10 with Rule 15 and had disclosed all of the evidence that they
11 intended to use at the trial, so I was a little bit surprised
12 that the prosecution is still looking for evidence in Katie's
13 personal property -- again, going back to the beginning,
14 property that they do not have probable cause to retain.

15 So those are my two suggestions, Judge,
16 that we set it for an evidentiary hearing or that you rule on
17 the pleadings.

18 THE COURT: Mr. Butner.

19 MR. BUTNER: Judge, that's fine, if the Court
20 wants to set it for an evidentiary hearing.

21 The probable cause to seize those items
22 was established in the search warrant affidavit on the basis
23 for the issuance for the search warrant. The computer lab --

24 THE COURT: Hang on a second.

25 Are you still there on the other side?

1 MS. CHAPMAN: Yes.

2 THE COURT: Okay. Thank you. It sounded
3 awfully quiet.

4 MR. BUTNER: It did. It sounded like it went
5 dead.

6 The DPS computer lab is still attempting
7 to complete the analysis of Katie's Mac computer and those
8 two other items. I think one is a case that has a couple of
9 thumb drives in it, and the other is some sort of other
10 storage device for computer-type information.

11 And I think I set forth in the motion
12 when they would -- or the response -- when the lab would be
13 complete -- have completed their work on those items. They
14 were seized from the defendant's residence.

15 THE COURT: Mr. Dupont?

16 MR. DUPONT: Yes, Your Honor?

17 THE COURT: Any additional information, since
18 this is your motion?

19 MR. DUPONT: No, Your Honor.

20 MR. HAMMOND: Your Honor, before you set that
21 down, either Miss Chapman or I would like to be heard briefly
22 on the aspect of this, that that relates to our understanding
23 about the prosecution's discovery obligations and the
24 deadlines in this case.

25 THE COURT: Oh, I don't know that you need to

1 do that. Let me -- that is kind of a different issue than
2 what Ms. DeMocker's issue is.

3 MR. HAMMOND: The reason I raised it, Your
4 Honor, is that the idea that there is forensic work that has
5 not yet been done, I think is inconsistent with a series of
6 orders issued by the Court, and I don't want our silence in
7 any way to be a suggestion that we accept the idea that
8 anything that they forensically examine today on property
9 seized in July --

10 THE COURT: It is not so construed by the
11 Court.

12 MR. HAMMOND: Thank you.

13 THE COURT: This is a companion matter to
14 Mr. DeMocker's matter but is actually Katie DeMocker's
15 motion.

16 When do you want to have a hearing in
17 connection with this, Mr. Butner, or Mr. Dupont? How far
18 off? Can you do something next week on it?

19 MR. BUTNER: I would have to look at my
20 calendar, Judge, and see what that looks like.

21 THE COURT: Go ahead.

22 MR. BUTNER: Thank you.

23 THE COURT: Maybe Thursday?

24 MR. DUPONT: Your Honor, is someone waiting
25 for me to say something?

1 THE COURT: No. Mr. Butner is looking at his
2 calendar.

3 I'll get back to you. I know it's hard
4 to tell, when we are on the phone.

5 MR. BUTNER: Judge, I'm scheduled for EDC
6 coverage that day. Aside from that, I don't have anything
7 else. Maybe late in the day would be the best for me, if
8 that's possible.

9 THE COURT: Are you available if I put this at
10 like three o'clock, Mr. Dupont, on Thursday of next week?

11 MR. DUPONT: I am.

12 THE COURT: All right. Three o'clock,
13 Mr. Butner?

14 MR. BUTNER: That is fine, Judge.

15 THE COURT: I will order setting a converting
16 hearing in re the property of Katie DeMocker as authorized
17 under A.R.S. 13-3922 for next Thursday, February 4th, 2010,
18 at 3:00 p.m.

19 Okay. I think back to where I was before
20 you raised that portion of the issue -- and let me give you
21 back your copy of the response to the motion. I presume that
22 it will come to me in due course.

23 Any grammatical, spelling, or other sorts
24 of matters, if you had the chance to go over the proposed
25 jury questionnaire that you wanted to point out?

1 MR. BUTNER: Judge, from the point of view of
2 the State, I went through the questionnaire. I didn't find
3 any such errors.

4 I do want to bring to the Court's
5 attention, though, that we will have another attorney helping
6 me on this case, Mr. Jeffrey Papoure. And so his name, of
7 course, should be added.

8 THE COURT: Okay. Will do.

9 MR. BUTNER: Thank you.

10 MR. DUPONT: Your Honor, may I be excused?

11 THE COURT: Yes. Thank you, Mr. Dupont.

12 MR. DUPONT: Thank you.

13 MS. CHAPMAN: Are we still considering the
14 questionnaire, Your Honor? Is that where we are?

15 THE COURT: Yes, Miss Chapman. If you have
16 any pointers, in particular, grammatical or stylistic
17 spelling things that I need to be concerned about.

18 MR. HAMMOND: We did find one, I think -- one
19 typographical error on what you have as Question 47.

20 THE COURT: Okay. Thank you.

21 MR. HAMMOND: I think what was intended is --

22 THE COURT: Actually, I see a lot of numbering
23 seems to be out of kilter that needs to be remedied. I
24 noticed just now. Okay. 47?

25 MR. HAMMOND: Yes. I think that probably

1 should be "what things stand"?

2 THE COURT: Yeah. I see. Thank you.

3 Anything else, Miss Chapman, that you
4 noticed? I appreciate extra eyes looking for those kinds of
5 things.

6 MS. CHAPMAN: No, Your Honor. Not with
7 respect to stylistic or other typographical issues.

8 THE COURT: I suppose I ought to get to the
9 main point of why I wanted to have today's hearing set, and
10 that was to see where we stand on the issue of access to
11 materials, and also that's the purpose, I'm sure, for
12 Mr. Fields being here.

13 So somebody wanted to brief me and get me
14 up to date on what you are saying as regards to that?

15 MR. BUTNER: Well, Judge, I think we had a
16 little bit of a glitch right at the start, in terms of
17 Mr. DeMocker having access to materials, and Mr. Sears gave
18 me a call Saturday morning, and I contacted the jail, and
19 they got the issue resolved, to my understanding.

20 And since that time, I think Mr. DeMocker
21 has had access to the materials in accordance with the most
22 recent orders of the Court. And maybe Mr. Fields will
23 address that more in full a little bit later. But I think
24 Mr. Hammond probably wishes to respond.

25 Thank you.

1 THE COURT: Mr. Hammond.

2 MR. HAMMOND: Your Honor, I do wish to
3 respond. The -- make sure I understand procedurally where we
4 are.

5 When the Court issued its order last
6 week, you then pointed out that it re-raised the question of
7 our pending motion to reconsider Mr. DeMocker's release. And
8 what you asked, at that time, was that in addition to setting
9 that down to be heard today, that we take this week to see
10 what we can do about the various accommodations that Captain
11 Cicero talked about last week when he was here and that
12 Mr. Fields spoke of. And we have done -- have done what we
13 can on that front. And we have invested a tremendous amount
14 of effort in the last week to deal with the concept of trying
15 to have Mr. DeMocker assist in the development of his
16 defense, without the access to the computers and telephones
17 that we had talked about before.

18 The first step in that, as Mr. Butner
19 points out, was increasing the access of Mr. DeMocker to his
20 paper files. We have very serious questions about
21 whether -- even if he did have full access to the tens of
22 thousands of paper documents, whether he could meaningfully
23 assist. But I think we're far from that point, given the
24 experiences of the last week.

25 When we left here last Friday, we

1 immediately contacted our copy service to copy at least
2 enough documents so that we could participate in a meaningful
3 experiment on the hard copy document front. We had those
4 documents copied. The first three banker's boxes of
5 documents were brought up here to the Verde Valley jail over
6 the weekend, and, as Mr. Butner learned, initially, the jail
7 simply rejected them.

8 That then got corrected, and the
9 documents were taken -- the boxes were taken, and that began
10 the process that has gone on now for the last five days of
11 Mr. DeMocker attempting to examine his documents.

12 They have removed the cell mate who was
13 sharing the cell with Mr. DeMocker, so he has the ability in
14 his cell to look at documents. But as the Court will recall,
15 there is a procedure that Captain Cicero talked about that we
16 now have experienced in some rich detail.

17 The process, as you will recall, is that
18 Mr. DeMocker could have a single box in his cell. If he
19 wished to change out that box or to look at a document in a
20 different box, they insisted that he put back every document
21 in the first box and return it in exchange for a different
22 box.

23 And so what happens, and what has
24 happened now for Sunday, Monday, Tuesday, Wednesday, and
25 Thursday, is this: When Mr. DeMocker is asking for a

1 document in a different box, he has to first obtain what is
2 called an "Inmate Request Form." He has been told that he
3 cannot have inmate request forms in his file -- I mean, in
4 his cell, and if he wants one, he must ask for it.

5 So each time, this week, when he has
6 wanted to look at a document in a different box, he has had
7 to request such a form. That process -- and we have
8 documented each of those requests. Those -- the amount of
9 time it takes to get the request form -- and again,
10 understand that nothing happens until you get the request
11 form -- first time it was 65 minutes; second time, 80
12 minutes; third time, an hour and 50 minutes; and then one
13 time, five minutes, which I think is closer to what Captain
14 Cicero thought might happen. Yesterday, it took 240 minutes
15 to get the request form.

16 Once a request form is received, then the
17 inmate may ask for the exchange. And in each occasion this
18 week, we attempted to have Mr. DeMocker record carefully the
19 amount of time it took, from the time he submitted the
20 request form, until the documents he asked for were received.

21 And as you will recall, the testimony
22 last week was that the correctional people thought there
23 would be no trouble in doing that promptly. I think Captain
24 Cicero said, on one or two occasions, that it might take a
25 little longer than immediately. You may remember, Judge, you

1 asked him yourself how long that might take, and he said if
2 there was a lunch going on or a count, it might take a little
3 bit longer, but generally it should happen promptly. That
4 turns out to be wishful thinking.

5 The first time after a request form was
6 submitted, it took nine hours and another 45 minutes.
7 Nine-and-three-quarters hours.

8 The next time that Mr. DeMocker asked, it
9 took nine hours.

10 We then had an occasion on, I believe
11 Tuesday, in which it only took two hours and a quarter
12 between the time that Mr. DeMocker filed his request form and
13 the time that the next box arrived.

14 Wednesday, the same day that the form was
15 received in five minutes, the box change-out occurred in two
16 minutes, which proves to us, at least, that it could have
17 been done.

18 Yesterday, however, it took
19 19-and-three-quarters hours, which means, essentially, that
20 Mr. DeMocker did not get to address his documents.

21 Mr. DeMocker periodically, attempting not
22 to be an obstructionist about this or an irritant, tried to
23 ask periodically "Why do I not have the boxes?" And for
24 instance, on the first day, he made that request five
25 times -- the initial request and four others before he got

1 the boxes. On two of the other occasions, he asked a total
2 of four times -- the initial request and three follow-ups.

3 So, I think in summary, at least on the
4 document front, the expectation that we heard about last
5 week, in a week in which one might have thought that the jail
6 would have been particularly conscientious about this point,
7 has been, I would say, massively unsuccessful. The sample is
8 only five days, so, you know, maybe doing an average is not
9 totally helpful. But we are talking about averages that
10 winds up being nine hours from the time he wants to work on a
11 new document until he can get it. So on the document front,
12 that's what happened.

13 And as the Court will remember from our
14 earlier hearings, the transfer of materials from one box to
15 something that might be in another box is absolutely
16 inevitable. One example that comes to mind, Your Honor, is
17 the enormous volume of material with respect to the financial
18 issues in this case. The documents with respect to the
19 divorce proceeding are in one place. The documents with
20 respect to the banking records that have been seized are in
21 another place. But that doesn't begin to put the client in a
22 position to assist his lawyer, because then we have to
23 find -- well, where are the things that Mr. Echols, the
24 State's expert, have said about this issue; where are the
25 interviews of the people who Mr. Echols and the County

1 Attorney interviewed? For instance, the people that we heard
2 about in this courtroom from UBS -- Mr. Van Steenhuyse being
3 one. Those records are in other places.

4 So it is not -- it is not simply a
5 matter -- and I could give you ten examples like this -- it
6 is not simply a matter of taking one box and saying once you
7 have read that box you have commanded any issue. I am sure
8 that Mr. Butner and his paralegal would say the same thing
9 that we do. That just can't be done.

10 There is no way, short of the aid of a
11 computer, to be able to take all of the wealth of information
12 and put it all in one place so that people can actually look
13 at it, and that was the experience we had this week on the
14 documents themselves.

15 I also have done some work on the use of
16 the telephone, which we have heard a lot about, and video
17 conferencing, and I can either address those now, or I see
18 Mr. Fields has moved chairs. Maybe he would like to share
19 with us his response to the document part of this before I go
20 on.

21 THE COURT: Let's hold on the phone and video
22 conferencing, then, and hear from Mr. Fields. Thank you.

23 MR. HAMMOND: Okay.

24 MR. FIELDS: Judge, I was in contact with
25 Captain Cicero today. He indicated there were some requests

1 for exchanges that were complied with.

2 What strikes me as unusual, or what
3 strikes me about this, I guess I should just say, is it
4 appears that the defense, either intentionally or
5 negligently, has kind of tried to set the jail up to fail.
6 Captain Cicero mentioned, when he testified last week, that
7 even what we were offering was unusual for the jail to do, to
8 place him in a single cell in general population and to agree
9 to store things on site and to do this exchange.

10 The jail is a place of rigid routine, and
11 to introduce something new into it takes some effort and
12 takes some time to adjust to. The reason I say "set up to
13 fail," I have been in contact with Mr. Sears over the video
14 issue since Tuesday, and none of these things were brought to
15 light. If there was a serious attempt by the defense to try
16 to make this system work, one would have hoped that they
17 would have said "Look, it's taking some time to get this
18 done. Can you do something about it? Can you try to shake
19 loose a little of the rigidity in the jail." That was simply
20 not done.

21 Now, there's a couple of other issues,
22 too. I was not under the impression -- I don't think this
23 Court ordered the jail to set the schedule, to do the things
24 that the jail, in fact, offered to do, which was the boxes
25 and files in the cell and the exchange and the video

1 conferencing and the phone.

2 The other thing that I thought was
3 interesting was that in my brief -- and Captain Cicero
4 confirmed this on the stand -- we offered two boxes in the
5 cell. Now we're being told that he's being only allowed one.
6 Again, if I know that -- I know what I said, I know what
7 Captain Cicero offered. If somehow that is in error, I need
8 to know so I can correct that error.

9 I'm kind of back to this is a place of
10 rigidity, and in order to shake loose and change a little
11 bit, we need to know that -- what is happening from their
12 perspective. For them to come in now and say, "Well, it's
13 just not working," because it didn't exactly come right out
14 of the shoot and do exactly what everybody said it was going
15 to do, I think is a little disingenuous.

16 So we are willing to -- the jail is
17 certainly willing to live up to what they said they would do,
18 which would be two boxes in the cell. That would solve the
19 problem of having to exchange documents between boxes. He
20 can do that there.

21 As far as the time limits of getting the
22 kites, I think we can probably address that, too, and getting
23 the boxes exchanged. But we do need to know if there are
24 problems here. The jail is not trying to be obstinate. But
25 again, trying to shake loose this rigidity is going to

1 require a little bit of effort, but I've got to know about it
2 before I can assist them with it.

3 And I think that is all I have to say
4 about that.

5 THE COURT: Back to you, Mr. Hammond, on the
6 phone, video issues that you wanted to raise. You don't need
7 to fail to respond, if you have something more to say.

8 MR. HAMMOND: I do. I do have something to
9 say to the Court about Mr. Fields' comments.

10 First of all, he's right. They said two
11 boxes, and that is what they gave him. I should have made
12 that clear. But from the time he gets the first two boxes,
13 anytime he wants to change and to add a new box, the process
14 is exactly as I described it.

15 And the idea that the County Attorney's
16 office would stand here today and say it didn't know that it
17 could take eight or nine hours to get a box exchanged -- and,
18 you know, it is a place -- I know I wrote down the words,
19 because I thought they are emblematic of the problem that we
20 have here. It is a place of rigid routine. But we had a
21 witness from the jail here last week who advised the Court
22 that he was the person in charge out there, and he said this
23 would be taken care of.

24 What we are here to say is not that we
25 designed this to fail. I think we did everything we

1 reasonably could do to test whether what we were told in
2 court last week can happen.

3 THE COURT: I have a question, then, as a
4 factual matter. You were talking about one box. On the
5 assumption that Mr. DeMocker is getting and is able to have
6 two boxes in the cell, does he have to give both back in
7 order to get another one? Can he keep one and send one back
8 and just get one more. If two is the limitation, I guess, I
9 would like to know how that is working.

10 MR. HAMMOND: Your Honor, I conferred with my
11 client to make sure I was correct about this, but as I
12 explained before -- first of all, you can't get any other box
13 unless you put back in the box that you have, or one of the
14 boxes you have, all of the documents in there. So if, for
15 instance, there is a financial document -- and you have seen
16 thousands of them -- but if there was a financial document in
17 one file that led Mr. DeMocker to want to see a document in a
18 different box, he would have to put that one back and then
19 change out a box.

20 THE COURT: He can keep Box "A" and change out
21 Box "B," so to speak?

22 MR. HAMMOND: Right. But he can't get -- he
23 can't hold onto a document, a financial statement or a
24 pleading in the divorce proceeding, and get the other
25 documents that might be related to it, unless he gives up a

1 complete box. So that's the process.

2 THE COURT: Okay. So, I have a financial
3 statement from the divorce in Box "A." I want to look at Box
4 "C." I have "A" and "B" in the cell with me. I have to give
5 up Box "B" in order to get Box "C," even if there is some
6 exhibits in "A," "B," and "C" that you want to compare and
7 contrast or whatever.

8 MR. HAMMOND: That's correct.

9 THE COURT: I think I follow.

10 Thank you. Go ahead.

11 MR. HAMMOND: I wanted to -- and if you don't
12 mind, since my eyesight is as good as Mr. Sears' hearing, let
13 me use the podium here so I can see.

14 THE COURT: Please.

15 MR. HAMMOND: We wanted to address the
16 telephone question, because looking at the transcript and
17 listening to the testimony here in court last week, it seemed
18 to us that we ought to have a little more clarity on what the
19 telephone situation is out there. Because part of the
20 process here was the idea that if Mr. DeMocker had documents
21 in his cell and he needed, then to talk to somebody about
22 them, he could go over to the telephone and call. And so
23 that is what we have tried to do this week.

24 You certainly can always wait for a legal
25 visit, but we wanted to try to experiment with actually

1 having him look at documents, and then try to use one of
2 those phones in the pod, understanding that unless he calls
3 Mr. Sears, those calls are not secure calls. But as we tried
4 to describe last week, the phone access is simply what is it.
5 You know, there is a pod of 40 people. They've got three
6 telephones. One of them is, for some reason, inoperable.
7 There are a couple others.

8 But I think it is important, Your Honor,
9 that we understand what we are talking about here. This is
10 not like a telephone that you can go sit down in front of
11 with a chair or a table or anything like that. And I know
12 that Mr. Fields will advise the Court that this is a place of
13 rigid routine. Well, this is a great example of the rigid
14 routine.

15 If you want to talk about a document, you
16 can take it from your cell and go over, and if the phone is
17 available, you can use it for up to 15 minutes. But you must
18 stand there and use it or maybe even kneel down on one knee
19 and use it to look at a document and talk on the phone. It
20 is -- I think you can do that if you had a case that involved
21 two or three or four documents.

22 It is almost impossible to imagine doing
23 that with the volume of material that we have in this case
24 that the client has, for reasons not of his own making, been
25 unable to review for months and months. This isn't the time

1 for us to review all of the things that happened before, the
2 last time that Mr. Fields came into this courtroom. But as
3 the Court knows we have been trying to find a way to solve
4 these issues for months.

5 And now that we have a situation in which
6 the suggestion was made, well, the phones are always
7 available, there is no reason why any inmate just can't do
8 what they want Mr. DeMocker to do, pick up a document, take
9 it out of his cell, and go over and use the phone. Well, it
10 just doesn't work. You do it for -- maybe by the time the
11 day is over, maybe you can do that for a couple of hours.
12 May even be able to do it for three or four hours.

13 But with the amount of work that we have
14 to do, that the Court is very well aware of, between now and
15 the time of trial, we think it is obvious that that's simply
16 not an acceptable way for him to try to assist us in his
17 defense, using a phone that is not a secure phone.

18 I do want to talk about the video
19 conferencing. And if Mr. Fields wants us to talk about the
20 telephones first, he can do that.

21 THE COURT: Why don't you move on to the video
22 conferencing.

23 MR. HAMMOND: Okay. We have investigated this
24 week -- and I am sorry that Mr. Sears couldn't be here
25 today -- but we have a lot of work to do. So it is not

1 always possible for us both to be at the same place at the
2 same time. But I have reviewed all of the communications
3 between Mr. Michael Holmes, who is the person in charge of
4 information services, and with Mr. Sears about video
5 conferencing. And I think the bottom lines, now, are these,
6 and if I am wrong, I am sure the County will be able to tell
7 us.

8 But first of all, the idea that the video
9 conference phones might be used to communicate with our
10 consultants, mitigation specialists, paralegals, our experts,
11 is simply not going to happen. The answer back from the
12 County is that the video conferencing equipment cannot be
13 used for that purpose.

14 Secondly, the question that we had about
15 whether the video conferencing could be used as a tool to
16 assist in looking at photographs, video tapes, and listening
17 to audio tapes, I think the answer is on looking at a
18 picture, if you just wanted to hold up a piece of paper, you
19 could look at a piece of paper on the video conference line.
20 There is no way that an inmate can reasonably look at a
21 videotape or look at a PowerPoint presentation of the type
22 that we have used here in court. You know, we have lots and
23 lots of photographs taken from the crime scene that are now
24 on a database. There isn't anybody who knows the inside of
25 that house better than Mr. DeMocker, having been a person who

1 built it.

2 And so what we had hoped to be able to do
3 was to be able to have him look at those photographs -- and a
4 whole list of others -- but to be able to be in a place where
5 he could look at photographs, manipulate them the way that we
6 can and the way our experts can to look at the crime scene
7 and other areas around the house. That simply can't be done
8 on the video-conferencing phone. It is simply beyond the
9 capacity.

10 The bottom line, I think, of both the
11 video PowerPoints and audio tapes is that if somebody is
12 going to listen to those, if Mr. DeMocker is going to be able
13 to do it, they are going to have to do it at the jail. And
14 somebody can go -- and I think it was actually suggested here
15 last week, that we could have somebody go to the jail and sit
16 in the contact booth -- one of the lawyers -- and play an
17 audio tape, show a videotape in that room. And I think we
18 can guess how many hours it would take to do that. But with
19 a little over three months left to trial, we think it is
20 pretty obvious that that's not a realistic alternative.

21 So our consensus on the video
22 conferencing is that it won't solve the problem that brought
23 us back together here. I haven't mentioned the time
24 limitation and the space limitation, but we are talking about
25 a facility that may be available for a couple of hours a day.

1 And even if we could arrange for there to be a second
2 video-conferencing capacity, it would still only be available
3 to us a couple of hours a day, and there are other issues
4 with respect -- we understand that Mr. DeMocker is not the
5 only person in the Verde Valley jail and that there are other
6 people that need to use it, as well.

7 But from our standpoint, as a way to
8 assure our client that he has an ability to assist us in the
9 defense, we don't believe that these alternatives would get
10 us anywhere close to that.

11 THE COURT: All right. Thank you.

12 Mr. Fields, on the phone and
13 video-conferencing issues, if you have something to respond?

14 MR. FIELDS: Sure. Thank you, Your Honor. I
15 appreciate it.

16 On really both -- let's start with the
17 telephone. No new information here. We indicated that, yep,
18 it's in general population, there is two to three phones in
19 there, that's what they confirmed.

20 We also know that Mr. DeMocker, by his
21 own admission, is doing three to four hours a day on the
22 telephone. You know, we -- any non-secured line, we
23 obviously have a recording on. We can confirm at least that,
24 if not more. So he knows how the telephone works, and there
25 is nothing new here. There is nothing that says the

18 Mr. Holmes has expressed to me that the
19 thought that, yeah, they should be able to get in without too
20 much of a problem. We've offered to have the laptops brought
21 here, have the technicians install the software, test it out
22 and make sure it works, and provide the laptops to the
23 defense team -- again, three of them, so that it can be in
24 three different locations, and test that.

25 So from the jail's perspective, I think

1 we've reasonably lived up to what we indicated we would do.

2 Back to the documents, very briefly. If
3 what he is indicating is so, it is something we need to fine
4 tune and tweak, and frankly, I am more than happy to help do
5 that.

6 But aside from that, you know, the issues
7 that they indicated they had last week, they still have. But
8 that is -- whether or not that is a reason -- it's certainly
9 not a reason to order the jail -- to order the sheriff to
10 give him a laptop, and I realize we are beyond that issue.

11 The release conditions issue is something
12 I would let Mr. Butner argue, and I am just here to indicate
13 what the jail has done and what they are willing to do. So
14 that's where we're at.

15 THE COURT: Clarify for me -- I guess I am not
16 totally tracking what you are saying about the Yavapai
17 County's willingness to loan three computers.

18 MR. FIELDS: No. The defense would supply
19 their computers, and we would install software that would
20 allow them to access -- allow them to go into the jail video
21 conferencing.

22 THE COURT: Oh, okay.

23 MR. FIELDS: And then when everything is done,
24 we would then ask that they return the laptops to us, and we
25 would then uninstall that software.

1 THE COURT: All right. So, on the defendant's
2 side of the equation, in the jail he would be able to have
3 access that the public defender's office uses to meet with
4 their clients and would be able to meet in one of those rooms
5 by way of a video, but the video wouldn't be tied in where
6 the defense team would have to be at the public defender's
7 office, for example --

8 MR. FIELDS: That's correct.

9 THE COURT: -- or other designated locations.
10 They could take their computer to Phoenix and make the calls
11 via Phoenix, if that's where they are or the experts are.

12 MR. FIELDS: Internet access.

13 THE COURT: Okay.

14 MR. FIELDS: And also, on the two to three
15 available hours per day, that is pretty much what we said
16 last week.

17 THE COURT: All right. Thank you.

18 Mr. Hammond.

19 MR. HAMMOND: Judge, this has happened to us
20 every time we have one of these conferences. We were told, I
21 think in pretty clear terms, that the idea of having our
22 consultants and experts and mitigation specialists have
23 access to this video conferencing was not going to happen. I
24 don't know if there has been a change and that what
25 Mr. Fields is now telling us is that they have changed their

1 mind, or if this is another one of those things where there
2 hasn't been communication properly.

3 But it was certainly clear -- and again,
4 I have looked at the e-mails -- it was certainly clear that
5 we attempted to leave no doubt that the reason we wanted to
6 be able to do this was so that we at least had some chance
7 for our consultants and experts to communicate directly with
8 our client, and we were told that we could not do.

9 THE COURT: And the date of that last e-mail
10 or information that said --

11 MR. HAMMOND: I think actually Miss Chapman
12 has it there. I think it was yesterday.

13 MR. FIELDS: Judge, Mr. Hammond's strength of
14 the statement is bothering me, because it was my
15 understanding that because there were three laptops and they
16 would just simply be given to the defense that they could
17 access -- I don't want to backtrack from what I said, but I
18 definitely want to double-check and make sure what I said was
19 accurate. Because if he feels this strongly about it, it is
20 something that I do want to make sure of. If you would like,
21 I could probably make a quick phone call and find out.

22 THE COURT: Miss Chapman, you have something
23 from yesterday or earlier today?

24 MS. CHAPMAN: I do, Your Honor, from yesterday
25 from Mr. Holmes, directed to John Sears, wherein John

1 indicated that we need some way to link out-of-state experts,
2 and Mr. Holmes's response is "As already stated, this is not
3 feasible, period."

4 MR. FIELDS: What he may be referring to is to
5 be able to link in at the same time as an attorney links in
6 or somebody here links in. In other words, multiple points
7 of entry. That, I know, is not technologically capable at
8 this point.

9 THE COURT: As distinguished from the expert
10 without a lawyer on the line being able to communicate
11 directly --

12 MR. FIELDS: Right. But if the Court -- I
13 would like to confirm with Mr. Holmes on that, but that is my
14 understanding. We were talking about multi-point access.

15 THE COURT: All right. Thank you. That may
16 clarify it a bit, but I will let you make a phone call and
17 see if you are able to get ahold of Mr. Holmes to ascertain
18 the accuracy of what you are saying.

19 Why don't I just do that right now.

20 Ms. Chapman, can I leave you on an open
21 line for the time being?

22 MS. CHAPMAN: Yes. That is fine, Your Honor.

23 THE COURT: I am going to take a few-minute
24 break. Probably five minutes. And we will be right back
25 with you, and you're probably going to hear a lot of racket

1 on this side.

2 MS. CHAPMAN: Okay. I will stand by.

3 (Brief recess.)

4 THE COURT: The record still reflects the
5 presence of the defendant and the lawyers who were here, and
6 Miss Chapman is still on the phone, I believe.

7 MS. CHAPMAN: I am, Your Honor.

8 THE COURT: Thank you.

9 And Mr. Fields had an opportunity to
10 place a call. Mr. Fields?

11 MR. FIELDS: Well, I am sorry to report that
12 the MIS director's telephone wasn't ringing, but I was able
13 to get through to him. Actually, we're both a little bit in
14 error.

15 What the question was: Is Mr. Sears
16 wanted to -- wanted installation. Wanted our folks to go --
17 apparently, asked the question. I don't think he pushed
18 extremely hard on it -- to go out of state and install the
19 software that's necessary on out-of-state computers.
20 Mr. Holmes balked at that.

21 But if the laptops come here, we can
22 certainly install them. He was -- we're willing to go to
23 five laptops, if necessary. And apparently, multi-point
24 conferencing is technically available. What it would look
25 like is a different story. It hasn't been tested or

1 anything, but I think we're ready to go with that.

2 The limit of two to three hours, that was
3 always the limit that we had expressed, because other people
4 use the services, as well.

5 THE COURT: Okay. Thank you.

6 Mr. Hammond, any clarifications that you
7 want to make? Anything else that you want to say on that?

8 MR. HAMMOND: Well, on the video conferencing,
9 the understanding I am now getting from this is that we still
10 will have two to maybe three hours a day.

11 For the reasons that we have said before,
12 and I want to stress again, at this stage of the case, we
13 just don't think there is enough time between now and the
14 time of trial. And I think we need to be clear about what we
15 are talking about here. This is a trial that is going to go
16 as a death penalty case on the 4th of May. So, there isn't
17 any --

18 THE COURT: I haven't any reason to disbelieve
19 that.

20 MR. HAMMOND: Nor do I. In fact, I have
21 reason to believe that it's absolutely right, from the
22 standpoint of the parties.

23 So that is what we are talking about
24 here, and given the time available with those limitations and
25 the inability that the conferencing system itself has for the

1 things I said before -- looking at video tapes, looking at
2 PowerPoints -- those things are still, to us, very much of a
3 problem.

4 I think the bottom line for us is that it
5 simply won't work. That is not to say I don't appreciate
6 that the County is now making an effort in that direction,
7 but we think it is way too little, way too late.

8 THE COURT: Thank you.

9 Mr. Butner, did you want to say -- or
10 Mr. Fields -- either one of you want to say anything else?

11 MR. BUTNER: Judge, I was with Mr. Fields,
12 standing by during the conversation with Mr. Holmes at MIS.
13 I don't really have anything to add.

14 THE COURT: All right. Thank you.

15 We have March 2nd set currently as our
16 next hearing date, if I am not mistaken. There were some
17 other obligations that I placed on the State from the
18 discovery standpoint for today, but I don't think we have any
19 interim hearings that are currently set. I guess I just set
20 one with Mr. Dupont and Mr. Butner.

21 And defendant DeMocker's presence is, I
22 don't think, necessary for that. I think that is a limited
23 issue of a third party's property that is in the possession
24 of the State for purposes of this case. And I don't
25 misunderstand the defense position with regard to the Rule 15

1 and discovery issues, Mr. Hammond. I do understand those
2 things. But I think as far as the return of the property
3 itself, that is an issue between a third party and the County
4 Attorney's Office. So I am not going to require
5 Mr. DeMocker's presence for that hearing next week.

6 Miss Chapman at one time had -- or maybe
7 it was you, Mr. Hammond -- had suggested that there is still
8 a forthcoming omnibus sort of motion that I don't know that
9 I've seen yet. I guess tell me what hearing times I may need
10 for that.

11 MR. HAMMOND: Yes. And let me back up for
12 just a moment to the Katie DeMocker issue. I heard what the
13 Court said on that topic. My memory of the Fourth Amendment
14 case law is not as crisp on this precise question as I would
15 like it to be, but since the cell phone and computers were
16 taken from Mr. DeMocker's home, I think there is a question
17 about his entitlement to participate in that. But I think
18 that is a burden I ought to take. I will look at that, and
19 if we believe he should be present, I will file something.

20 THE COURT: Please. Please let me know,
21 because the jail will have to know for transport purposes.

22 MR. HAMMOND: I understand that.

23 On the omnibus question, I wish you could
24 see Miss Chapman's face, because I know she is probably
25 chuckling over this. We have been going back and forth all

1 week and we've been in different parts of the country, but we
2 have been looking at an omnibus motion that we hope to file
3 very soon. And if you want to add anything on where that
4 stands right now --

5 MS. CHAPMAN: My hope is that if it was
6 convenient for the Court, we could hear that motion on the
7 March 2nd date, I think. We ought to be able to file it in
8 time to allow briefing to take place and to be heard on the
9 2nd, if that is convenient with the Court's calendar.

10 THE COURT: Is it possible, Miss Chapman, to
11 do that motion, as well as do a couple of other motions that
12 you or Mr. Sears or Mr. Hammond raised with regard to a
13 motion to preclude on expert witnesses with regard to a
14 couple of the detectives. That is to say, can we take up
15 that motion to preclude at the same time?

16 MS. CHAPMAN: Your Honor, I believe we can,
17 although I don't think that, from our perspective, in terms
18 of preparing, just because of the time frame, that we would
19 want to wait until march to be heard on the motion to
20 preclude with respect to these recently disclosed experts. I
21 realize that that was just filed today. We just received
22 notice of it on the 22nd, but I'd hate to wait to know what
23 our situation is going to be vis-a-vis those experts, and
24 getting so close to trial.

25 THE COURT: The trouble is, I am running out

1 of time myself.

2 MS. CHAPMAN: Understood.

3 MR. BUTNER: Judge, I would bring to the
4 Court's attention at this time that the State is going to be
5 filing a couple of motions in limine in terms of experts to,
6 so to speak, prequalify them, have a determination made
7 concerning their expert qualifications.

8 THE COURT: All right. I am on notice.

9 I'll confirm the hearings that we
10 currently have set, then, on those respective issues, and
11 March 2nd is the next one I think where everybody -- at least
12 under my current understanding is going to be present. I am
13 going to continue to have this issue of modification of
14 release under advisement.

15 If there are other issues that pertain to
16 that, such that you think I need a supplement of information,
17 in particular with regard to this setting up of computer
18 issues, I am open to receiving that additional information.

19 MR. HAMMOND: Your Honor, from our end, we
20 will try between now and very early next week to confirm the
21 details of the video conferencing offer so that we are sure
22 that we all are on the same fact base. And then if we think
23 we need to have a further conference with the Court, we will
24 advise you as early in the week as possible.

25 THE COURT: I appreciate that.

1 MR. FIELDS: Your Honor, I will check with the
2 jail and with Mr. Hammond and/or Mr. Sears to see if we can't
3 facilitate some of the document exchanges. While we know it
4 is difficult, we understand the gravity of what is going on
5 there.

6 THE COURT: I appreciate that, Mr. Fields. We
7 will stand in recess on Mr. DeMocker's case.

8 We're going to hang up on you now,
9 Miss Chapman. Thank you.

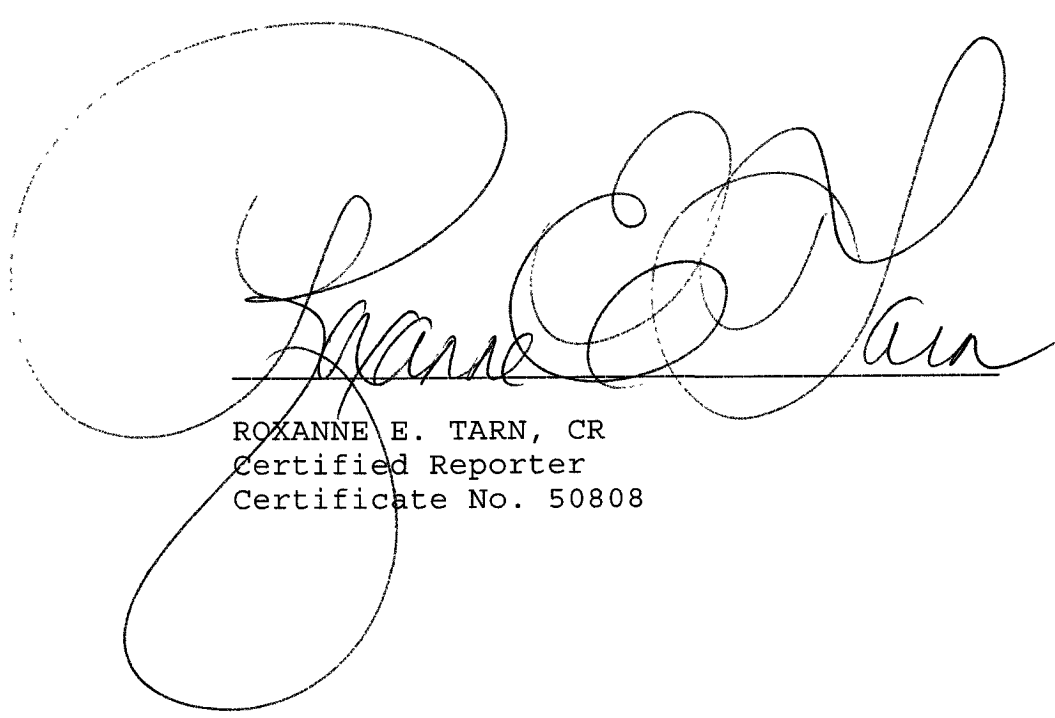
10 (Whereupon, these proceedings were concluded.)

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C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter
in the State of Arizona, do hereby certify that the foregoing
pages 1 - 39 constitute a full, true, and accurate transcript
of the proceedings had in the foregoing matter, all done to
the best of my skill and ability.

SIGNED and dated this 25th day of February,
2010.



ROXANNE E. TARN, CR
Certified Reporter
Certificate No. 50808